Supreme Court Of The United States

OCTOBER TERM, 1974
No. 73-6866

DANIEL S. MULHALL - - - - - **Petitioner**

versus

INMONT CORPORATION - - - **Respondent**

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
QUESTION PRESENTED	ii
STATEMENT OF THE CASE	1-3
ARGUMENT	3-4
Under the controlling Kentucky case in point, the Sixth Circuit correctly held that the petitioner's intentional misuse of the duplicating fluid to kindle a fire in violation of the label warning it was dangerous and flammable near fire or flame rendered him guilty of contributory negligence which barred his recovery as a matter of law	3-4
CONCLUSION	5

TABLE OF AUTHORITIES

	PAGE
Erie R.R. Co. v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938)	3
Hercules Power Company v. *Hicks*, 453 S.W.2d 583 (Ky. 1970)	4
Jones v. *Hutchinson Manufacturing, Inc.*, 502 S.W.2d 66 (Ky. 1973)	4
Post v. *American Cleaning Equipment Corporation*, 437 S.W.2d 516 (Ky. 1968) [distinguished]	4
Shelanie v. *National Fireworks Association*, 487 S.W.2d 921 (Ky. 1972)	3

QUESTION PRESENTED

Did the Sixth Circuit correctly apply Kentucky law in holding that where the petitioner was burned by ignition of duplicating fluid he was using to kindle a fire in violation of a label warning it was dangerous and flammable near fire or flame, he was guilty of contributory negligence which barred recovery for his injuries?

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May it please the Court:

STATEMENT OF THE CASE

This is a product liability damage suit based on diversity of citizenship for burn injuries sustained by the petitioner, a 16-year old Boy Scout, while or immediately after he was using a gallon can of the defendant-respondent's "Interchem" duplicating machine fluid to kindle an outdoor trash fire in a 55-gallon drum.

The label which inspired the petitioner's use of the duplicating fluid for the above purpose bore the following warning legend:

"DANGER: FLAMMABLE
HIGHLY TOXIC — VAPOR HARMFUL
See Cautionary Material Elsewhere on Can

DANGER
FLAMMABLE MIXTURE
DO NOT USE NEAR
FIRE OR FLAME

* * *

POISON
Contains Wood Alcohol
NOT FOR INTERNAL USE

* * *

USE WITH ADEQUATE VENTILATION
AND AVOID INHALATION OF VAPOR
KEEP OUT OF REACH OF CHILDREN

INSTRUCTIONS

Remove metal cap, insert spout and fill the tank. Always put cap back on can. Use in adequately ventilated room. Do not use near flame.

* * *"

At the trial in the Federal District Court at Louisville, Kentucky, the petitioner testified:

> "Q. You knew it was risky, dangerous, to use duplicating fluid to start a fire, didn't you?
> A. Yes sir."

The District Court directed a verdict for the defendant-respondent at the close of the plaintiff's case on the ground, inter alia, that the plaintiff was guilty of contributory negligence as a matter of law by misusing the duplicating fluid to kindle a fire in violation of the label warning it was dangerous and flammable near fire or flame.

The Sixth Circuit affirmed on the authority of *Shelanie* v. *National Fireworks Association*, 487 S.W.2d 921 (Ky. 1972), which held that the intentional ignition of the contents of an aerial bomb by a 14-year old boy was contributory negligence which barred his recovery for burn injuries as a matter of law.

ARGUMENT

Under the controlling Kentucky case in point, the Sixth Circuit correctly held that the petitioner's intentional misuse of the duplicating fluid to kindle a fire in violation of the label warning it was dangerous and flammable near fire or flame rendered him guilty of contributory negligence which barred his recovery as a matter of law.

Since this case is based on diversity of citizenship, it is fundamental that the extent to which the petitioner's contributory negligence will affect or defeat his right to recover is governed by Kentucky law. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The Kentucky Court of Appeals is squarely on record that the intentional ignition of a flammable substance in disregard of danger warnings is contributory negligence as a matter of law.[1]

Shelanie v. *National Fireworks Association*, 487 S.W.2d 921 (Ky. 1972), on which the Sixth Circuit relied in denying recovery, held that summary judgment was properly entered against a 14-year old boy who had repeatedly been warned of the danger of fireworks and

[1]Since in our view the petitioner's contributory negligence necessarily renders all other matters moot, the label warning (which equaled or exceeded any applicable statutes or regulations) will not be discussed at length herein.

who was burned when he ignited the contents of an aerial bomb. The court said:

> "It must be concluded that Keith exposed himself to a danger which an ordinarily prudent child of like age, experience and intelligence would recognize as creating an unreasonable risk of serious bodily injuries and to which he therefore would not expose himself. His negligence was a proximate cause of the injury of which he now complains."

The same rule was followed in *Jones* v. *Hutchinson Manufacturing, Inc.*, 502 S.W.2d 66 (Ky. 1973), where the negligence of a farmer in operating a grain auger into which his 5-year old daughter fell and lost her lower leg was held to be the sole cause of her injury; and in *Hercules Powder Company* v. *Hicks*, 453 S.W.2d 583 (Ky. 1970), where a construction worker who used a jackhammer to level a high spot containing unexploded dynamite was held guilty of contributory negligence as a matter of law.

Aside from the petitioner's misuse of the duplicating fluid for a purpose so foreign to that for which it was designed and intended, the obvious distinction between the case at bar and *Post* v. *American Cleaning Equipment Corporation*, 437 S.W.2d 516 (Ky. 1968), where the Kentucky Court of Appeals specifically authorized the defense of contributory negligence in product liability cases but held it was a jury question under the facts there involved, is that there the label on a vacuum cleaner restricting its use to a designated voltage was so terse and inconspicious the plaintiff testified he never even saw it before inadvertently plugging it into the wrong outlet.

CONCLUSION

The Sixth Circuit correctly applied Kentucky law in holding that the petitioner's intentional misuse of the duplicating fluid to kindle a fire in violation of the label warning it was dangerous and flammable near fire or flame rendered him guilty of contributory negligence which barred his recovery as a matter of law. No other matter which would warrant the exercise of certiorari is involved.

The application for the writ should be denied at the petitioner's cost.

Respectfully submitted,

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